

June 19, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

ALFREDO SUAREZ,

Appellant

v.

MASCO CORPORATION,

Respondents.

No. 50566-5-II

UNPUBLISHED OPINION

LEE, J. – Alfredo Suarez appeals the jury’s verdict in favor of Masco Corporation,<sup>1</sup> finding that the Board of Industrial Insurance Appeals (the Board) was correct when it decided that Suarez was not entitled to time loss benefits from October 2013 through December 2014. Suarez argues the trial court erred when it denied his motion for a continuance before jury deliberations. We hold that the trial court did not err. Accordingly, we affirm.

**FACTS**

Suarez worked for Masco, a self-insured employer, as an insulation installer. On June 27, 2012, Suarez was injured while rolling a bundle of insulation toward a house he was insulating when the roll started to fall down a slope. Suarez had a cervical microdiscectomy in November 2012 to repair a herniated disc and shoulder surgery in July 2013 to repair his right shoulder. Suarez returned to work part time, on light duty separating work orders. In October 2013, Suarez

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<sup>1</sup> Masco Corporation is now known as TopBuild Corporation.

felt he was no longer able to work due to his injuries and filed a claim with the Department of Labor and Industries (the Department).

The Department ordered Masco to pay time loss compensation for the period of October 11, 2013, through December 10, 2014. Masco appealed this order to the Board.

The Board reversed the Department's order, concluding Suarez was not a temporarily totally disabled worker from October 11, 2013, through December 10, 2014; therefore, he was not entitled to time loss compensation for this period. After his petition for review to the Board was denied, Suarez appealed the Board's decision to the superior court.

Before trial, the trial court discussed with the jury "how the scheduling will work." Verbatim Report of Proceedings (VRP) at 2. The trial court informed the jury that they "go from 9:00 o'clock till noon typically" and then take a lunch break. VRP at 2. The trial court advised the jury that "[w]e generally don't stay be - past 5:00 o'clock." VRP at 2. The trial court explained that "there's some staffing and overtime issues for the courthouse here so in order to avoid running up extra expense we try to be out promptly by 5:00 o'clock." VRP at 3.

At trial, the certified board record was read to the jury. On the second day of trial, the parties started at 10:17 AM. The reading of the record ended at 3:21 PM. Suarez then moved to continue the trial to the next day. He argued that retiring the jury for deliberations now would not give them enough time to deliberate. The trial court denied the motion, stating:

Well I'll note that it's basically an item in the discretion of the court. I'm in favor of good time management. They've already given up two days. They were advised that the trial could certainly go three days.

So I'm inclined – it will take probably ten minutes or less to read the instructions and then we go to closings. So let's see how far they get today and

they can certainly be informed that if they need to come back tomorrow morning they'll have the time to do that.

VRP at 7.

The jury began deliberations at 4:39 PM and returned a verdict at 5:08 PM. The jury returned a verdict in favor of the Board. Suarez appeals.

### ANALYSIS

Suarez contends the trial court abused its discretion in denying his motion for a continuance. We disagree.

#### A. STANDARD OF REVIEW

We review the trial court's decision to deny a continuance motion for abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. *Id.* at 671

#### B. DENIAL OF MOTION FOR CONTINUANCE

In exercising its discretion regarding a continuance motion, a court may consider many factors including the necessity of reasonably prompt disposition of the litigation, the maintenance of orderly procedure, and due process. *Id.* at 670; *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011). Due process requires a fundamentally fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Under ER 611(a), a trial court is granted reasonable control over the mode of presenting evidence so as to avoid needless consumption of time. Moreover, "[t]he length of jury deliberations is a matter within the trial court's discretion." *People v. Marshall*, 165 Ill. App. 3d

968, 521 N.E.2d 538, 547, 118 Ill. Dec. 256 (1987). While there is no Washington case directly on point, the Illinois case of *People v. Marshall* is instructive. There, the jury retired to deliberate at 9:20 PM. *Id.* at 542. On appeal, Anthony Marshall argued the verdict was coerced because the jury felt compelled to reach a verdict that evening. The appellate court disagreed, holding, “The length of jury deliberations is a matter within the trial court’s discretion and will not be disturbed absent an abuse of that discretion.” *Id.* at 547. The *Marshall* court found no abuse of discretion. *Id.*

Here, the trial court expressed the importance of “good time management” and recognized that the jury had “already given up two days.” VRP at 7. The trial court considered the time to read the jury instructions and for counsel to make their closing remarks before submitting the matter to the jury for deliberations. The jury would receive the case towards the end of the day; nevertheless, the trial court stated that it would take into consideration “how far [the jury] gets today” and if needed the trial court would inform the jury that it could come back the next day. VRP at 7. The trial court also recognized that the jury was “advised that the trial could certainly go three days.” VRP at 7.

Based on the above, the trial court properly considered the reasonably prompt disposition of the case and the orderly procedure of the case in denying Suarez’s motion for a continuance and allowing the jury to proceed with deliberations. While the jury was informed that “generally” it did not stay past 5:00 PM, the jury was *not* told that it must make a decision by 5:00 PM. There was the possibility that the jury would return the next day if needed. Thus, the trial was not fundamentally unfair, and the trial court did not violate due process by submitting the matter to the jury in the late afternoon.

Suarez has not clearly demonstrated that the trial court's ruling was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.<sup>2</sup> Accordingly, the trial court did not abuse its discretion in denying his motion for a continuance.

C. ATTORNEY FEES

Suarez argues that should he prevail on this appeal and on retrial in superior court, he is entitled to attorney fees pursuant to RCW 51.52.130. However, because Suarez does not prevail, he is not entitled to attorney fees.

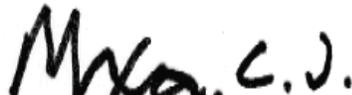
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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Lee, J.

We concur:

  
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Worswick, J.

  
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Maxa, C.J.

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<sup>2</sup> Suarez also argues that, contrary to RCW 51.52.115, he was not given a full opportunity to present his case because of “the restrictions placed on the process by the trial court in limiting jury deliberation.” Br. of Appellant at 19. However, Suarez fails to explain what he was prevented from presenting or describe any aspect of his case that he was not allowed to present. RAP 10.3(a)(6). Therefore, we do not consider this argument.